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Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *Pennsylvania Interscholastic Athletic Association v. NLRB,* Nos. 18-1037, 18-1043; Oral Argument held November 16, 2018

Dear Mr. Langer:

Pursuant to FRAP 28(j), Intervenor Office and Professional Employees International Union (OPEIU) responds to Pennsylvania Interscholastic Athletic Association's (PIAA) January 25, 2019 letter of supplemental authority regarding *SuperShuttle DFW, Inc.,* 367 NLRB, No. 75 (*SuperShuttle*). In *SuperShuttle* the NLRB overruled *FedEx Home Delivery,* 361 NLRB 610 (2014), *enf. den. and vacated,* 849 F.3d 1123 (D.C. Cir. 2017) (*FedEx*).

In *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002), this Court established the factor of "entrepreneurial opportunity" as the touchstone in determining whether workers are employees or independent contractors in affirming the NLRB's finding that the workers were employees. This Court adhered to this teaching in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009)(*FedEx I*). In line with these decisions, *SuperShuttle* also emphasizes "entrepreneurial opportunity". 367 NLRB No. 75, fn. 4 ("entrepreneurial opportunity … has always been at the core of the common-law test" used to determine the employer versus independent contractor question. The NLRB overruled *FedEx* because it "severely limit[ed] the significance of entrepreneurial opportunity". *Id.* at pp. 11-12. Here, OPEIU has already

demonstrated that the lacrosse officials lack entrepreneurial opportunity. *SuperShuttle* does not affect this analysis, and this case should not be remanded.

Finally, this Court does not give the NLRB much deference when reviewing NLRB decisions as to whether workers are independent contractors or statutory employees. *FedEx I*, 563 F.3d at 496)("We thus do not grant great or even 'normal' deference to the Board's status determinations").

In sum, contrary to PIAA's assertion, *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974) has no application here because, as explained above, there is no relevant intervening change in NLRB law.

Very Truly Yours,

/s/ Melvin S. Schwarzwald
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Counsel for Intervenor OPEIU

cc: All counsel of record via ECF filing.